



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 11, 1993

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 99  
Huntsville, Texas 77342-0099

OR93-313

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19624.

The Texas Department of Criminal Justice (the "department") has received a request for information relating to an employee disciplinary investigation. Specifically, the requestor seeks:

1. Statements of interviews or transcribed interviews between [Mr. Jerry Jackson, Deputy Chief, Investigative Operations Bureau] and [the requestor] on the following dates; January 30, 1992, February 5, 1992, February 18, 1992.
2. Statements of interviews or transcribed interviews between [Mr. Jackson] and all persons interviewed during this investigation.
3. All documents relied on during this investigation to determine the outcome of this investigation.
4. The name/names of the person/persons providing the allegations made against [the requestor] along with whatever evidence that person/persons may have supplied.
5. A list of the exact rule violations that were being investigated.
6. The IOC/memorandum that was written to Mr. Gant by [Mr. Jackson] detailing the outcome of the investigation.

This request was hand-delivered to the governmental body on August 11, 1992. On August 13, 1992, Mr. Jerry Jackson responded to the request, claiming in effect that "no documents have been generated" that were responsive to the request. The requestor has resubmitted his original request as part of an employee grievance. You have submitted to us for review handwritten documents generated by Mr. Jerry Jackson that are responsive to the request and advise us that the department is also in possession of tape recordings of interviews generated during the investigation. You do not explain why this information was overlooked in Mr. Jackson's initial response to the requestor.

Section 7(a) of the Open Records Act requires a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. You received the request for information under the Open Records Act on August 11, 1992. We received your request for a decision in a letter dated March 25, 1993. Consequently, you failed to request a decision within the ten days required by section 7(a) of the act. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling reason to withhold the information to overcome this presumption. See *id.* Normally, the presumption of openness can be overcome only by a compelling demonstration that the information should not be released to the public, *i.e.*, that the information is deemed confidential by some other source of law or that third party interests are at stake. Open Records Decision No. 150 (1977); see also Open Records Decision No. 586 (1991) (law enforcement interest of third party may be compelling). You claim that the requested information is excepted by section 3(a)(1) of the Open Records Act in conjunction with the informer's privilege and by section 3(a)(8).

Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The informer's privilege has been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of *citizens* to communicate their knowledge of the commission of crimes to law-enforcement officials

and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added.]

The informer's privilege aspect of section 3(a)(1) protects the identity of persons who report violations of the law. The content of an informer's communication may be withheld where it is necessary to protect the informer's identity. Open Records Decision No. 377 (1983). When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191 (1978). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285, 279 (1981); *see also* Open Records Decision No. 208 (1978). The privilege does not apply ordinarily to employees "reporting" to their employers about the job performance of other employees, *see* Open Records Decision No. 515, nor does it generally apply to witness statements taken from employees responding to questions presented to them in the scope of their employment, Open Records Decision No. 579 (1990).

We have examined the information for which you seek informer's privilege protection. Generally, it consists of witness statements taken during interviews conducted by investigating officers or documents related to these statements. Each of the witnesses are department employees and have worked with the subject. Their statements were taken in response to questions posed by the investigator and include discussions of their job duties and the job duties of others working with them. Although some of the statements include allegations of wrongdoing, such allegations appear to relate to deficiencies in job performance and do not communicate specific violations of the law. These statements were clearly solicited from employees responding to questions presented to them in the scope of their employment. We conclude, therefore, that the information submitted to us for review may not be withheld from required public disclosure under section 3(a)(1) of the Open Records Act in conjunction with the informer's privilege.

You also claim that the information submitted to us for review is excepted from required public disclosure by section 3(a)(8) of the Open Records Act, which excepts

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

When the "law enforcement" exception is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex Parte Pruitt*, 551

S.W.2d 706 (Tex. 1977)); *see also* Open Records Decision No. 413 (1984) (Department of Corrections is a "law enforcement" agency within the meaning of section 3(a)(8)).

You advise us:

one of the reasons for our reticence about sharing this material is for [the requestor's] own protection. [The requestor] is a competent investigator and supervisor and has done an excellent job resolving the employee grumps that were flagged during Jackson's inquiry. Once he knows who said what, if he should take any negative action against any of his subordinates, especially one of those who spoke particularly critically, he may be exposed to employee discipline and termination for retaliation. We believe the best thing for both the agency and for [the requestor] is to bury all this quietly.

Your contention that section 3(a)(8) is implicated here is supported only by your speculation that the requestor, upon reviewing the records at issue, will retaliate against his subordinates. Such speculation does not demonstrate how and why release would unduly interfere with law enforcement, nor does it overcome the presumption of openness arising from the department's failure to timely respond to the request for information. We conclude therefore that the requested information must be released in its entirety immediately.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



William Walker  
Assistant Attorney General  
Opinion Committee

WMW/GCK/jmn

Ref.: ID# 19624  
ID# 19750  
ID# 19912

cc: Mr. Edward E. McElyea  
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